

REDACTED-FOR PUBLIC INSPECTION

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VIA HAND DELIVERY

October 1, 2007

Marlene H. Dortch, Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Suite 5-C327
Washington, DC 20554

*Re: Petitions of Qwest Corporation for Forbearance Pursuant to
47 U.S.C. § 160(c) in the Denver, Minneapolis,-St. Paul,
Phoenix, and Seattle Metropolitan Statistical Areas, WC
Docket No. 07-97*

Dear Secretary Dortch:

Enclosed for filing in the above-referenced proceeding are two copies of the REDACTED version of the Reply Comments of Affinity Telecom, Inc.; Cavalier Telephone, LLC; CP Telecom, Inc.; Globalcom, Inc.; McLeodUSA Telecommunications Services, Inc.; Integra Telecom, Inc.; and TDS Metrocom, LLC and supporting declarations (collectively "Opposition"). This filing is also being submitted in the Commission's Electronic Comment Filing System (ECFS).

Under separate cover and in accordance with the Second Protective Order in this proceeding,¹ Highly Confidential copies of the Reply Comments are being submitted to you along with Gary Romondino, Jeremy Miller and Denise Coca of the Wireline Competition Bureau.

¹ *Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas, WC Docket No. 07-97, Second Protective Order, DA 07-2293, ¶ 14 (rel. June 1, 2007).*

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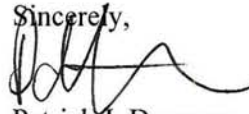
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Also enclosed is an extra copy of this redacted filing, please date stamp and return it to the courier. Should you have any questions about this filing, please contact me.

Sincerely,



Patrick J. Donovan

Enclosure

cc: Janice Myles (all via e-mail)
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**Affinity, Cavalier, CP Telecom
Globalcom, McLeodUSA, PAETEC, Integra, TDS
WC Docket No. 07-97
October 1, 2007**

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054**

In the Matter of)	
)	
Petitions of Qwest Corporation)	
for Forbearance Pursuant to 47 U.S.C. § 160(c))	WC Docket No. 07-97
in the Denver, Minneapolis-St. Paul, Phoenix and)	
Seattle Metropolitan Statistical Areas)	

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GLOBALCOM, INC.
MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.
PAETEC COMMUNICATIONS, INC.
INTEGRA TELECOM, INC.
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Dated: October 1, 2007

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SUMMARY

The Commission should give determinative weight to the fact that three of the four state regulatory commissions, and the Staff of the fourth, of the states in which the MSAs at issue are located have opposed the Qwest Petitions.

The Commission should take this opportunity to scrap the *Omaha Order* and establish a new forbearance approach to focus on facilities-based wholesale competition, to forbear only consistent with impairment as determined under the *TRRO*, to conduct a more granular analysis, to establish a considerably more rigorous evidentiary approach to evaluating wholesale alternatives than a "predictive judgment," and to establish a public interest balancing that recognizes and gives appropriate weight to competition.

Initial comments confirm that Qwest's Petitions fail to show a competitive market that could justify forbearance. Based on cable operators' comments and churn studies, cable is not providing any significant competition to Qwest's residential or enterprise telephony services in any of the subject MSAs. Comments show that competitors continue to rely on Qwest facilities. Qwest showing of competition is flawed because its white pages listings information is unreliable and submitted in violation of Section 222 of the Act and because it double counts categories of competitors.

Grant of the Petitions would not serve the public interest. Qwest has not shown that TELRIC discourages investment because TELRIC prices embody the industry's best estimate of prices that would prevail in a competitive market. Forbearance would harm competition because Qwest would raise prices for wholesale inputs to competitors' and impose other unreasonable terms and conditions.

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The Petitions should be denied.

TABLE OF FREQUENTLY USED SHORT CITATIONS

FCC Decisions

<i>Anchorage Order</i>	<i>Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area, WC Docket No. 05-281, Memorandum Opinion and Order, 22 FCC Rcd 1958, FCC 06-188 (rel. Jan. 30, 2007)</i>
<i>Omaha Order</i>	<i>Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) appeal pending, Time Warner Telecom, et al. v. FCC, No. 05-4769 (D.C. Cir.)</i>
<i>Special Access NPRM</i>	<i>Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, WC Docket No. 05-25, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994, FCC 05-18 (rel. Jan. 31, 2005).</i>
<i>TRRO</i>	<i>Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, 20 FCC Rcd 2533 (2005), aff'd, Covad Commc'ns Co. v. FCC, 450 F.3d 528 (D.C. Cir. 2006)</i>

Other Filings

ACS Petition	Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as amended, for Forbearance from
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	Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area, WC Docket No. 05-281 (filed September 30, 2005)
GAO Report	U.S. GENERAL ACCOUNTABILITY OFFICE, REPORT TO THE TO THE CHAIRMAN., COMMITTEE ON GOVERNMENT REFORM, HOUSE OF REPRESENTATIVES - TELECOMMUNICATIONS, "FCC NEEDS TO IMPROVE ITS ABILITY TO MONITOR AND DETERMINE THE EXTENT OF COMPETITION IN DEDICATED ACCESS SERVICES (November 2006)
McLeodUSA Petition for Modification	Petition of McLeodUSA Telecommunications Services, Inc. for Modification, WC Docket No. 04-223 (filed July 23, 2007)
Petitions	Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Colorado Metropolitan Statistical Area, WC Docket No. 07-97 (filed Apr. 27, 2007); Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Minneapolis-St. Paul, Minnesota Metropolitan Statistical Area, WC Docket No. 07-97 (filed Apr. 27, 2007); Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area, WC Docket No. 07-97 (filed Apr. 27, 2007); Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Seattle, Washington Metropolitan Statistical Area, WC Docket No. 07-97 (filed Apr. 27, 2007)

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TDS METROCOM, LLC**

Affinity Telecom, Inc.; Cavalier Telephone, LLC; CP Telecom, Inc.; Globalcom, Inc.; McLeodUSA Telecommunications Services, Inc.; PAETEC Communications, Inc.; Integra Telecom, Inc.; and TDS Metrocom, LLC submit these Reply Comments with respect to the above-captioned Petitions of Qwest Corporation requesting forbearance from regulatory obligations in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle MSAs.¹

¹ *Pleading Cycle Established for Comments on Qwest's Petitions for Forbearance in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas, Public Notice, DA 07-2291 (rel. June 1, 2007). Wireline Bureau Grants Extension of Time to File*

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I. STATE COMMISSION COMMENTS ARE ENTITLED TO DETERMINATIVE WEIGHT

Three of the four regulatory commissions of the states in which the subject MSAs are located oppose the Qwest Petitions.² Although the Minnesota Public Utilities Commission (“MPUC”) has not yet filed comments, the MPUC Staff has issued a report that recommends that the MPUC oppose the Petitions.³ The state commission comments and MPUC Staff Report point out, *inter alia*, that grant of the Petitions would undermine facilities-based competition,⁴ “commercial agreements” are not an effective replacement for UNEs, a more granular analysis beyond residential and enterprise markets is required,⁵ the emphasis should be on a competitive wholesale market,⁶ and that UNE forbearance would be contrary to the public interest.⁷ State Commission comments reinforce other commenters’ Oppositions to the Qwest Petitions in

Comments on Qwest’s Petitions for Forbearance in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas, Public Notice, DA 07-3042 (rel. July 6, 2007).

² See Initial Comments of the Arizona Corporation Commission, WC Docket No. 07-97 (filed Aug. 31, 2007) (“ACC Comments”); Comments of the Colorado Public Utilities Commission, WC Docket No. 07-97 (filed Aug. 31, 2007) (“CPUC Comments”); Comments of the Washington Utilities and Transportation Commission, WC Docket No. 07-97 (filed Aug. 29, 2007) (“WUTC Comments”).

³ Staff Briefing Paper, Minnesota Public Utilities Commission, Docket No. P-421/C1-07-661, September 27, 2007, p. 20. (“MPUC Staff Paper,” attached).

⁴ WUTC Comments at 5.

⁵ ACC Comments at 6.

⁶ *Id.* at 13.

⁷ *Id.* at 15.

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numerous respects including that Qwest ignores the extent to which competitors remain dependent on Qwest last mile connections,⁸ and that forbearance will cause CLECs to exit the market.⁹

The Commission in other contexts has observed that states are frequently in the best position to assess competition in, and the need for regulatory oversight concerning, local telecommunications market.¹⁰ It is local competition, rather than interstate communications, that would be most directly adversely affected by UNE forbearance. Therefore, the Commission should give determinative weight to state commission opposition to the Qwest Petitions. The Commission may include state commission opposition as part of its public interest analysis under Section 10(a)(3).

II. THE COMMISSION SHOULD ESTABLISH A NEW APPROACH TO UNE FORBEARANCE

One of the key recommendations of state commissions is to revisit the overall approach to forbearance that the Commission established in the *Omaha Order*. The Arizona Corporation Commission ("ACC") recommends that in light of events since the *Omaha Order*, including the

⁸ WUTC Comments at 8.

⁹ MPUC Staff Paper at 10-11.

¹⁰ See, e.g., *Review of the Section 251 Unbundling Obligations of Local Exchange Carriers*, CC Docket No. 01-338, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶ 495 n.1536 (2003) ("[s]tates are, therefore, better positioned to draw these lines. Because states are more familiar with how these variations have affected competitive entry, and because there was no credible record evidence to show how we could establish these boundaries based on a national scale, we ask the states to create these boundaries.").

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price increases proposed by Qwest to McLeodUSA for last mile connections in Omaha and the GAO Report, as well as the fact that the *TRRO* has not yet been fully implemented in Arizona,¹¹ require that the Commission adopt a revised approach to consideration of BOC UNE forbearance petitions.¹²

The ACC understates the case for a revised approach to UNE forbearance. The *Omaha Order* rested on an indifference to Qwest's continued possession of market power in provision of last mile connections and on the thinnest possible predictive judgment that Qwest would make reasonable wholesale offerings in spite of evidence to the contrary. The *Omaha Order* rested on a weak public interest analysis that did not give serious consideration to the possibility that premature UNE forbearance would harm competition. The Commission has ample authority to alter course based on new information or even based on a reevaluation of the same facts¹³ and it should do so here. The Commission should simply scrap the *Omaha Order* and start over.

Specifically, the Commission should modify its forbearance approach to focus on facilities-based wholesale competition, to forbear only consistent with impairment as determined

¹¹ ACC Comments at 17.

¹² *Id.* at 3-5.

¹³ See, e.g., *GTE California, Inc. et al. v. FCC*, 39 F.3d 940, 950 (1994) ("The FCC, no doubt, is entitled to change its mind based on new experience."). See also, e.g., *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1044-45 (2002) ("The Commission may, of course, change its mind, but it must explain why it is reasonable to do so."); *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) ("An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis.").

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under the *TRRO*, to conduct a more granular analysis, to establish a considerably more rigorous evidentiary approach to evaluating wholesale alternatives than a "predictive judgment," and to establish a public interest balancing that recognizes and gives appropriate weight to competition.

The Focus Should Be On Wholesale Competition. The Commission's forbearance decision in the *Omaha Order* was based primarily on an analysis of the retail market.¹⁴ Not only did that decision dwell on cable market share but it assumed that retail competition would incent Qwest to make reasonable wholesale offerings.¹⁵ The emphasis on retail competition has invited the instant Petitions which, as pointed out in initial comments, ignore the reality that Qwest is the only wholesale provider in Denver, Minneapolis, Phoenix, and Seattle and that nearly all the competitors cited rely on Qwest last mile connections.¹⁶

However, sustainable competition cannot be realized unless there exists viable cost-based, wholesale alternatives to the ILECs' bottleneck facilities so that incumbent carriers are no longer deemed "dominant" in local services markets.¹⁷ As pointed out by Time Warner, a single

¹⁴ ACC Comments at 13.

¹⁵ *Omaha Order* ¶ 67.

¹⁶ See, e.g., Ad Hoc Comments at 10; CPUC Comments at 4; Covad Comments at 41-44; Earthlink Opposition at 33; COMPTTEL Opposition at 31-35.

¹⁷ Cf. *Verizon*, 535 U.S. at 538 (upholding Commission rules that interpret the "statutory dut[ies]" of section 251(c) to "reach the result the statute requires" and thereby "get[] a practical result").

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facilities-based competitor is insufficient to meet the requirements of Section 10.¹⁸ There must be sufficient facilities-based wholesale competition that “minimize[s] the risk of duopoly and coordinated behavior or other anticompetitive conduct.”¹⁹ And, wholesale competition does not appear to be affected to any significant degree by increased competition in the retail market from cable.²⁰

Accordingly, the Commission should modify its UNE forbearance approach to give primary weight to the existence of actual facilities-based competition in wholesale markets.²¹

Forbearance Should Be Consistent with the UNE Impairment Analysis. The Commission should reject its previous approach of forbearing from UNE obligations even where competitive carriers are impaired under the Commission's rules. As pointed out in initial comments, the statutory impairment standard cannot be ignored simply because Qwest seeks relief under section 10 rather than section 251(d)(1).²² The relief Qwest requests is the legal and practical equivalent of a finding of non-impairment in particular MSAs identified in Qwest's Petitions.

¹⁸ Time Warner Comments at 11.

¹⁹ *Omaha Order*, ¶ 71.

²⁰ *See, e.g.*, ACC Comments at 13-14.

²¹ *See, e.g.*, ACC Comments at 13-14; COMPTTEL Opposition at 31-33.

²² Opposition at 65.

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The *TRRO* already provides for the lifting of section 251(c) unbundling obligations based on the competitive presence and impact of CLECs in Qwest's wire centers.²³ There is no need for further relief.²⁴ The public interest is best served by an outcome that does not represent a dramatic departure from the *TRRO* proceeding.²⁵ The Commission should adopt a forbearance approach that recognizes that its rules already provide relief where it is justified by competition and that forbearance should arrive at a similar conclusion.²⁶

This is the only lawful result. The D.C. Circuit's decision in *AT&T Corp. v FCC*²⁷ requires that the Commission review forbearance requests in a manner that is consistent with the Commission's prior policies and standards applied in similar cases or explain why it is reasonable to depart from them.²⁸ When considering petitions for forbearance from the Act's unbundling requirements, the Commission's analysis must be consistent with its impairment framework established in the *TRRO* and affirmed by the D.C. Circuit in *Covad*.²⁹ Granting Qwest's petition, whether in whole or in part, absent an impairment analysis consistent with the

²³ ACC Comments at 18.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 19.

²⁷ *AT&T v. FCC*, 236 F.3d 729, 736 (D.C. Cir. 2001) ("*AT&T*").

²⁸ *Id.* (finding that the Commission's analysis in evaluating forbearance from dominant carrier regulation cannot depart from Commission's traditional non-dominance analysis without justifying such departure.)

²⁹ *See Covad Comm'ns Co. v FCC*, 450 F.3d 528 (D.C. Cir. 2006).

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TRRO would represent an unexplained departure from the FCC's affirmed impairment standard.³⁰

A More Granular Analysis. As pointed out in initial comments, with respect to business customers, it is particularly important that the Commission separately analyze the SME business market segment.³¹ BOCs have not provided, and are not able to provide efficiently, a level of attention and quality of service that best serves SME business customers. CLECs, on the other hand, are able to provide these customers service features, quality, and customer care levels that BOCs are only motivated and able to provide to their largest customers. Marketing differences, customer size, capacities of service, and customer needs qualify the SME as a separate market segment. These differences, in turn, require separate consideration with respect to the SME market of each of the factors that the Commission may consider in its forbearance analysis.

The small business market is distinct from the residential market. There are vast differences in terms of the ability of CLECs to serve these market segments via their own facilities.³² CLECs remain dependent on Qwest in many cases for UNE loops to reach customers even where

³⁰ See *Covad*, 450 F.3d 528.

³¹ Opposition at 9.

³² ACC Comments at 13-14.

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they compete with Qwest for customers.³³ The level of competitive supply of independent loops and transport will vary according to the capacity of facilities.³⁴

For these reasons, an analysis of just the mass and enterprise markets is insufficient.³⁵ To adequately “determine “the extent to which ... forbearance will enhance competition”³⁶ the Commission must conduct a separate analysis of the extent to which forbearance would impact competition for each market segment, *i.e.*, mass market, SME, and enterprise, and for each transport or “loop type”, *i.e.*, DS0, DS1 and DS3.

Predictive Judgments Are Unreliable. Given the potential harm to consumers, the Commission should establish a more solid foundation than a predictive judgment for eliminating UNE obligations. As observed by the MPUC Staff:

Leasing of facilities from Qwest represents, by far, [CLECs] largest single operating expense. Qwest's tariffed special access rates for DS1 and DS3 represent an extreme increase in expense. And evidence from Omaha suggests that Qwest, if granted forbearance, may raise its rates for DS0 loops to a significant degree. Staff believes such rate increases would seriously

³³ *Id.* at 16.

³⁴ Opposition at 8.

³⁵ *TRRO*, ¶ 210.

³⁶ 47 U.S.C. § 160(b).

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jeopardize the CLECs' ability to offer services at competitive rates, ultimately driving them from the market.³⁷

The consequences of an erroneous forbearance would be that consumers will have fewer or no competitive choices, resulting in higher prices and less innovation. Price increases are likely to occur, forcing competitors to leave both the wholesale and retail markets, resulting in fewer choices to consumers.³⁸

The Omaha predictive judgment has proved erroneous. As noted by COMPTTEL,³⁹ McLeodUSA has shown that once Qwest was granted Phase II pricing flexibility in the Omaha MSA, it *increased* its special access monthly DS1 channel termination rates 45.83% over the price cap rate for month-to-month customers, 42.61% over the price cap rate for one year term customers and 31.58% over the price cap rate for 2 year term customers.⁴⁰ This showing is consistent with the recent findings of the GAO Report that found that BOCs have increased prices under Phase II pricing flexibility.⁴¹ This pricing behavior is conclusive evidence that

³⁷ MPUC Staff Paper at 20.

³⁸ ACC Comments 21. *See also, e.g.,* COMPTTEL Opposition at 21.

³⁹ COMPTTEL Opposition at 24.

⁴⁰ Eben Declaration at ¶ 9.

⁴¹ Government Accountability Office, *FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, GAO-07-80 (Nov. 2006) at 27-28.

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Qwest is exercising significant market power.⁴² Qwest has also imposed other unreasonable terms and conditions on use of last mile connections in the absence of UNE obligations.⁴³

The Commission should be more careful in the future than in the *Omaha Order* where it concluded that reasonable wholesale alternatives would be available based on the FCC's conjecture as to incentives of the current and only wholesale provider to support its competitors. The Commission should establish an evidentiary standard for the existence of wholesale competition that focuses on the existence of actual facilities-based competition, not on the basis of a "predictive judgment."

A Public Interest Analysis that Gives Due Weight to Promoting Competition. Section 10(b) requires the Commission in making its public interest determination to consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions and enhance competition among telecommunications providers. Unfortunately, the *Omaha Order* gave insufficient foresight to the possibility that its "predictive judgment" would prove inaccurate. It now appears that CLECs will exit markets in an environment of UNE forbearance.⁴⁴ As stated by the MPUC Staff:

CLECs have, effectively no access to most customers without the use of Qwest's last mile facilities and that the CLECs provide the only effective competition to Qwest in the busi-

⁴² See, e.g., WAG Comments at 8; Comments of BT Americas Inc. on Behalf of Itself and Other BT Americas Entities, WC Docket No. 07-97, at 12-13 (filed Aug. 31, 2007).

⁴³ See Section IV, *infra*.

⁴⁴ See, e.g., McLeodUSA Petition for Modification at 14-15.

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ness markets and provide an important competitive threat in the residential market. At present, although CLECs represent a significant competitive force, staff believes that ...granting Qwest's petition holds the very real possibility that Qwest could emerge as the only provider for a large portion of the telecommunications services available to Minnesotans.⁴⁵

The Commission should adopt a public interest analysis that recognizes the benefits of competition and at the same time embodies a realistic and cautious assessment of the likely consequences of UNE forbearance.

III. INITIAL COMMENTS CONFIRM THAT QWEST'S PETITIONS FAIL TO SHOW A COMPETITIVE MARKET THAT COULD JUSTIFY FORBEARANCE

The comments filed in response to Qwest's Petitions confirm that Qwest's competitive showings in the MSAs at issue fail to justify forbearance. Without exception, those commenting on the issue agree that Qwest's petitions must be denied because its showing is internally inconsistent, unexplained, incomplete, and simply fails to meet statutory forbearance standards. Commenters agree that Qwest's meager and off-base showing regarding the level of competition in the MSAs at issue lack the level of granularity currently required by the Commission.⁴⁶ As noted by Covad, "[i]t is *not* the burden of either the Commission or other interested parties to

⁴⁵ MPUC Staff Paper at 22.

⁴⁶ See, e.g., ACC Comments at 7; Comments of Covad Communications Group, NuVox Communications, and XO Communications, LLC, WC Docket No. 07-97, at 25 (filed Aug. 31, 2007) ("Covad Comments"); Cox Comments at 6-7, 9-10; NASUCA Comments at 3; Opposition of Earthlink, Inc. and New Edge Network, Inc. to Qwest Corporation's Petitions for Forbearance in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas, WC Docket No. 07-97, at 48 (filed Aug. 31, 2007).

extrapolate this data, sort these issues out and, after identifying the relevant markets, to apply the hodgepodge of anecdotes and general information Qwest provided with its Petitions in an attempt to conduct the careful analysis Qwest chose not to undertake.”⁴⁷

A. The Record Conclusively Demonstrates that Cable Is Not Providing Significant Competition to Qwest’s Telephony Services

Initial comments underscore what the undersigned competitive carriers made clear in their Opposition - cable is not providing any significant competition to Qwest’s residential or enterprise telephony services in any of the subject MSAs. For example, Comcast stated that “in *none* of its [Comcast Digital Voice] markets, including Minneapolis-St. Paul, has Comcast yet achieved a penetration rate of even **** Begin Highly Confidential -- End Highly Confidential **** of homes passed, let alone at the levels in the *Omaha Order*.”⁴⁸ Similarly, in the Denver MSA, only 6.2% of residential households surveyed had Comcast as their local provider, according to the Colorado Office of Consumer Counsel.⁴⁹ Regarding the enterprise market, Comcast states that it “currently serves fewer than **** Begin Highly Confidential -- End Highly Confidential --**

⁴⁷ Covad Comments at 16.

⁴⁸ Comments of Comcast Corporation, WC Docket No. 07-97, at 5 (filed Aug. 31, 2007) (“Comcast Comments”). And since Comcast does not pass as many homes in an MSA as the ILEC, Comcast’s market share would actually be less than the penetration rate. *Id.*

⁴⁹ Comments of the Colorado Office of Consumer Counsel, WC Docket No. 07-97, at 22 (filed Aug. 31, 2007) (“COCC Comments”). Furthermore, Comcast’s Digital Voice is not a substitute for POTS, since it includes an “‘all you can eat’ and ‘bells and whistles’ telephone offering which includes local and unlimited long distance calling as well as ‘12 popular calling features.’” *Id.* at 24 (*citing* Comcast’s website for Product Details for Comcast LimitedTM).

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dential ** enterprise business customers in the Seattle, Minneapolis-St. Paul markets *combined*.”⁵⁰ Likewise, the Minnesota Public Utilities Commission recently concluded that although “Qwest has pointed out the considerable growth in the cable and wireless industries in recent years...at a more granular level, staff agrees with the CLECs that wireless and cable technologies do not compete with CLECs in the small and medium business market.”⁵¹

Additionally, as submitted by the undersigned competitive carriers and Time Warner, independent churn studies show that cable is not a significant competitor. The undersigned competitive carriers submitted a study that concluded that Integra rarely, if ever, loses customers to cable operators. The study specifically showed that of those customers who switched from Integra to another telecommunications provider and for whom Integra was able to identify the new provider, only approximately 12% switched to a cable operator.⁵² Cbeyond only lost a total of ** **Begin Confidential -- End Confidential** ** customers to cable providers from January 2007 to May 2007 and that the average monthly cable churn rate for this five-month period was ** **Begin Confidential --percent End Confidential** **. ⁵³ Eschelon only lost a total of ** **Begin**

⁵⁰ Comcast Comments at 6.

⁵¹ MPUC Staff Paper at 20.

⁵² Opposition of Affinity Telecom, Inc., Cavalier Telephone, LLC, CP Telecom, Inc., Globalcom, Inc., McLeodUSA Telecommunications Services, Inc., Integra Telecom, Inc. and TDS Metrocom, LLC, WC Docket No. 07-97, at 57 (filed Aug. 31, 2007) (“Opposition”).

⁵³ Errata to Opposition of Time Warner Telecom, Inc., Cbeyond Inc., and Eschelon Telecom, Inc. WC Docket No. 07-97, at 31-32 (filed Sept. 13, 2007) (“Time Warner Opposition”).

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Confidential -- End Confidential ** customers throughout Colorado from the first quarter of 2004 through the end of the second quarter of 2007, lost ** **Begin Confidential -- End Confidential** ** customers in Minnesota, and ** **Begin Confidential -- End Confidential** ** customers in Washington during the same period.⁵⁴ In Arizona, Eschelon's average quarterly churn rate for cable competition over the 10-quarter period was a mere ** **Begin Confidential --** percent **End Confidential** **. ⁵⁵

Qwest skews the level of cable competition in the Phoenix MSA by falsely portraying Cox as a facilities-based competitor in the entire Phoenix MSA.⁵⁶ As Cox established in its comments, "Cox is not franchised to provide cable services in the entire Phoenix MSA, nor does it provide telephone service throughout the entire MSA."⁵⁷

McLeodUSA has obtained access to a study by GeoResults that shows Qwest controls access to the vast majority of commercial buildings in Minneapolis. This study shows that as of August 2007 there were 125,379 commercial buildings in Minneapolis, of which only ****Begin Highly Confidential** **End Highly Confidential**** had a lit CLEC presence. Cable had connections to only ****Begin Highly Confidential** , or less than %, **End Highly Confiden-**

⁵⁴ *Id.* at 32.

⁵⁵ *Id.*

⁵⁶ Comments of Cox Communications, Inc. WC Docket No. 07-97, at 29 (filed Aug. 31, 2007) ("Cox Comments").

⁵⁷ *Id.*

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tial** of commercial buildings. While this information pertains to only one of the subject MSAs, it shows that Qwest has grossly exaggerated the extent of cable competition.

Rather than provide the Commission with data regarding cable company market penetration in the telecommunications market for each of the MSAs impacted by its petitions, which the Commission considered in its *Omaha* and *Anchorage Orders*, Qwest provides the Commission with false statements and inconsistent methodologies and approaches that precludes any findings about competition in the MSAs.⁵⁸ Qwest's inability to support its rhetoric with facts is not surprising as Qwest faces no real competition from cable in any of the subject MSAs.

At bottom, as noted by COMPTTEL, "[a]lthough various cable companies may have upgraded their cable plant to provide cable-based telephony and thus may provide some measure of facilities-based competition in each MSA, the Qwest petition fail[s] to provide the granular data necessary for analysis of the presence of facilities-based competition in each product market."⁵⁹

B. Competitors Continue to Rely on Qwest Facilities

As the undersigned competitive carriers explained, the reason why currently competitive fiber extends to few buildings and that competitors remain dependent on Qwest facilities is that competitors are rarely able to justify construction of their own loops. The record establishes that

⁵⁸ Opposition at 13-14.

⁵⁹ Opposition of COMPTTEL to Qwest's Petitions for Forbearance, WC Docket No. 07-97, at 25 (filed Aug. 31, 2007) ("COMPTTEL Opposition). *See also, e.g.*, Comcast Comments at 7; Cox Comments at 19.

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a significant number of competitors in all of the subject MSAs continue to use Qwest's UNE loops as the primary vehicle for serving and acquiring customers.⁶⁰ A point which even Qwest concedes.⁶¹ As set forth by the Ad Hoc Telecommunications Users Committee ("Ad Hoc"):

Not only does Qwest enjoy overwhelming dominance in the switched access line market, but the overwhelming majority of competitive services are themselves dependent upon the availability of reasonably-priced Qwest services and facilities. Yet it is precisely with respect to these *wholesale* services that Qwest seeks regulatory forbearance. Thus, even if the Commission were to conclude – which it should not – that the level of retail competition is sufficient to justify the forbearance that Qwest seeks, that conclusion provides no basis, and Qwest has provided no

⁶⁰ See, e.g., COMPTTEL Opposition at 33; CPUC Comments at 11 ("Qwest is currently obligated to provide leased access to its facilities and most CLECs rely on this unbundled offering to provide their services."); Comments of the Public Counsel Section of the Washington State Attorney General's Office *et al.*, WC Docket No. 07-97, at 3-4 (filed Aug. 31, 2007) ("WAG Comments") ("[i]n the Seattle MSA competitive local exchange carriers (CLECs) are highly dependant on the availability of cost-based unbundled loop and transport in order to provide competitive services to small and business enterprises.").

⁶¹ According to the Brigham-Teitzel Declarations submitted by Qwest, "CLECs are utilizing Qwest wholesale services to compete with Qwest in every wire center in the Phoenix," Denver, Minneapolis-St. Paul, and Seattle MSAs. See Declaration of Robert H. Brigham and David L. Teitzel Regarding the Status of Competition in the Phoenix, Arizona Metropolitan Statistical Area, at ¶ 22; Declaration of Robert H. Brigham and David L. Teitzel Regarding the Status of Competition in the Denver, Colorado Metropolitan Statistical Area, at ¶ 22; Declaration of Robert H. Brigham and David L. Teitzel Regarding the Status of Competition in the Minneapolis-St. Paul Metropolitan Statistical Area, at ¶ 24; Declaration of Robert H. Brigham and David L. Teitzel Regarding the Status of Competition in the Seattle, Washington Metropolitan Statistical Area, at ¶ 24.

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other evidentiary basis, for determining that such retail competition as exists today would survive if the Qwest wholesale services upon which that retail competition depends were unregulated.⁶²

Additionally, Ad Hoc demonstrated how formidable the entry barriers confronting even large CLECs, such as Level 3, actually are. Level 3 hopes to add 750 to 1,000 buildings to its network in 2007.⁶³ But since there are 100,000 “enterprise buildings” within 500 feet of Level3’s metro fiber in the U.S., Level 3 must continue to rely on Qwest’s facilities because “it would take between *100 and 140 years* for Level 3 to ‘light’ all of those 100,000 buildings.”⁶⁴ Further, to the extent there is some actual competition, Qwest is silent as to the extent to which competitors are providing service using their own facilities without dependence on the UNEs for which Qwest seeks forbearance.

All of this should come as no surprise, however, to the Commission as PennTel, McLeodUSA, and DeltaCom recently provided the Commission with declarations establishing

⁶² Declaration of Lee L. Selwyn on Behalf of the Ad Hoc Telecommunications Users Committee, at ¶ 6 (Aug. 3, 2007) (“Selwyn Declaration”) *filed as an attachment to* Comments of Ad Hoc Telecommunications Users Committee, WC Docket No. 07-97 (filed Aug. 31, 2007) (“Ad Hoc Comments”).

⁶³ Selwyn Declaration at ¶ 31 (*citing* Level3 Communications Analyst and Investor Conference 2007, “From VoIP to Video: Making Sense of the Content (R)evolution,” at slide 36.)

⁶⁴ Selwyn Declaration at ¶ 31.

that they are rarely able to find or construct alternatives to ILEC last mile facilities in the markets in which they operate.⁶⁵

C. *Qwest's Showing of Competition is Flawed in Numerous Additional Respects*

1. *Qwest's Reliance On White Pages Data Is Unreliable and In Violation of Section 222 of the Communications Act of 1996*

Qwest estimates the level of competition provided by CLECs in the MSAs at issue by projections made from its own white pages listings.⁶⁶ Not only is Qwest's extrapolation unreliable, its use of the customer information contained in white pages listings is in violation of Section 222 of the Communications Act.

Qwest reasons that since its internal data shows that about 75% of Qwest's residential lines⁶⁷ and 36% of Qwest's enterprise lines⁶⁸ are listed in white pages, those same percentages must therefore hold true for CLEC customers.⁶⁹ Qwest's use of this data is a clear violation of Section 222 of the Communications Act which prohibits the use of customer proprietary network

⁶⁵ See Petition of McLeodUSA Telecommunications Services, Inc. for Modification, WC Docket No. 04-223, at 56 n.156 (filed July 23, 2007) ("McLeodUSA Petition for Modification").

⁶⁶ Minneapolis Petition at 10-11; Denver Petition at 10; Phoenix Petition at 10; Seattle Petition at 10.

⁶⁷ See Minneapolis Petition at 10; Seattle Petition at 10; Phoenix Petition at 10; Denver Petition at 10.

⁶⁸ See Minneapolis Petition at 24; Seattle Petition at 23; Phoenix Petition at 24; Denver Petition at 23.

⁶⁹ See Minneapolis Petition at 23-25; Seattle Petition at 22-24; Phoenix Petition at 23-25; Denver Petition at 22-24.

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information ("CPNI") for purposes other than the provision of telecommunications service.⁷⁰

Specifically, Section 222(c)(1) states that:

[e]xcept as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.⁷¹

These white pages listings are customer proprietary network information that Qwest only possesses by virtue of its status as a telecommunications carrier. Put another way, Qwest feels entitled to use this information to advance its interests – when the information was provided by competitors with an expectation that it would be used solely for provisioning of their services – is, in and of itself, evidence that Qwest is not ready to be relieved of its obligations as a dominant carrier.⁷² The undersigned competitive carriers were hardly alone in noting this. Ad Hoc agrees, and adds that "Qwest is, in fact, the *only* carrier in each market that is in a position to possess, mine, and utilize competitor data in support of its own business purposes and regulatory strate-

⁷⁰ 47 U.S.C § 222.

⁷¹ 47 U.S.C. § 222(c)(1).

⁷² Declaration of Helen E. Golding, Economics and Technology, Inc., at ¶ 13 *filed as an attachment to Opposition*.

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gies – providing additional evidence of its unique and dominant position in each of these markets.”⁷³

Even if the Commission were to accept Qwest’s use of its white pages data, Qwest fails to provide any explanation of how it determined this percentage or why it should be correct for all CLECs. Qwest’s reliance on its own internal white pages data is severely misplaced because it assumes that CLEC customers in each of the subject MSAs choose to be listed in the white pages at the same rate as Qwest’s nationwide customer base. As Cox aptly noted, Qwest’s use of white page listings “provides the Commission with no information that corresponds to the Commission’s Section 251 forbearance test, and the data it does provide is speculative and disingenuously presented.”⁷⁴

2. *Qwest Double Counts Categories of Competitors*

As the undersigned competitive carriers explained in their Opposition, CLECs are frequently fiber providers, fiber collocators, systems integrators, and even wireless providers. Qwest’s description of CLECs does not enumerate an additional type of competitor, but merely for all practical purposes duplicates information provided in its descriptions of other alleged types of competitors.

⁷³ Selwyn Declaration at ¶ 25.

⁷⁴ Cox Comments at 19.

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Cox also points out that “although Qwest presents enterprise competition from Cox in a different section from that provided by competitive LECs, it provides the number of business lines served by all competitive LECs (including Cox) in the wireline competitive LEC section, effectively double-counting Cox and creating the impression that competitive LECs have gained a much greater portion of the enterprise market than they have.”⁷⁵ Qwest also double counts Comcast Digital Voice service and VoIP.⁷⁶

3. *VoIP Data Submitted By Qwest Has Previously Been Rejected By the Commission and Should Be Rejected Now*

The Commission should reject Qwest’s attempt to use VoIP providers in its enterprise and mass market competitive showings, just as the Commission did in the *Omaha* and *Anchorage Orders*.⁷⁷ Aside from falling woefully short of even the current degree of granularity required by the Commission, Qwest’s submission that VoIP providers are providing competition to Qwest’s telecommunications services is not substantiated with any valid data. For example, as observed by the Arizona Corporation Commission, “VoIP should not be considered a serious local exchange service alternative for wireline service” because “VoIP services continue to

⁷⁵ *Id.* at 18 (citing Phoenix Petition at 24).

⁷⁶ Comments of the Colorado Office of Consumer Counsel, WC Docket No. 07-97, at 30 (filed Aug. 31, 2007).

⁷⁷ *Omaha Order*, ¶ 72; *see also Anchorage Order*, ¶ 29 (concluding that “we do not include competition from wireless and interconnected VoIP services in [the] market analysis”).

undergo the difficult transition from embryonic to introductory to mainstream.”⁷⁸ COMPTEL also points out that the statewide broadband statistics Qwest relies upon to show VoIP penetration rates have been rejected by the Commission as “completely unsuitable for purposes of analyzing competition and market share.”⁷⁹ The VON Coalition adds, in fact, that “[m]any over-the-top VoIP customers (directly or indirectly) use the ILECs’ facilities.”⁸⁰

IV. QWEST HAS NOT SHOWN THAT FORBEARANCE WOULD SERVE THE PUBLIC INTEREST

Initial comments make clear that there are no public interest benefits to be gained from forbearance. The MPUC Staff correctly observes that Qwest provides no evidence to support the claim that unbundling has stifled investment.⁸¹ To the contrary, CLECs have invested \$500 million just in Minnesota.⁸² Qwest's claims that TELRIC discourages investment are bogus because "TELRIC rates embody the industry's best estimates of rates which would prevail in a competitive market. Rates sustained above TELRIC indicate that at least some competitive market conditions are not present allowing the rate setter to exert non-competitive market power

⁷⁸ ACC Comments at 10.

⁷⁹ COMPTEL Opposition at 43 (*citing Verizon/MCI Merger Order*, 20 FCC Rcd 18433, at ¶ 49 n.135 (2005)); *see also, e.g.*, VON Coalition Comments at 3.

⁸⁰ VON Coalition Comments at 3; *see also* WAG Comments at 10 (“VoIP, however, is still a fledgling services and...requires a broadband connection, which, in the case of a business, is most likely provided by an ILEC.”).

⁸¹ MPUC Staff Paper at 19.

⁸² *Id.*

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...⁸³ Nor can the costs of unbundling exceed benefits in the absence of competitive market conditions.⁸⁴

On other hand, harms that would be caused by forbearance are real. Qwest would increase prices for wholesale services which would cause CLECs at a minimum to raise prices to consumers or more likely exit the market entirely.⁸⁵ Qwest would be able to increase rates “at will” for services sold through commercial agreements.⁸⁶ As noted by COMPTTEL,⁸⁷ the Commission has previously determined that forbearance will not serve the public interest or promote competitive market conditions where, as here, it is likely to lead to an increase in prices for wholesale inputs that competitors need to provide service:

Specifically, we find that forbearance would be likely to raise prices for interconnection and UNEs (particularly those that may constitute bottleneck facilities), inputs competitors must purchase from incumbent LECs in order to provide competitive local exchange service. Because we find that the result of forbearance would be higher costs for competitive LECs which could impair their ability to enter and compete in local markets, we cannot find that forbearance would promote competitive market conditions.⁸⁸

⁸³ *Id.* at 20.

⁸⁴ Covad Comments at 61.

⁸⁵ *See, e.g.*, COMPTTEL Opposition at 21. *See also*, McLeodUSA Petition for Modification at 14-15; Declaration of Pritesh D. Shah, Director of Business Planning and Analysis, McLeodUSA, WC Docket No. 04-223, at ¶ 4 (July 23, 2007) *filed as an attachment to* McLeodUSA Petition for Modification.

⁸⁶ WAG Comments at 6.

⁸⁷ COMPTTEL Opposition at 35.

⁸⁸ *In the Matter of the 1998 Biennial Regulatory Review – Review of Depreciation Requirements for Incumbent Local Exchange Carriers*, CC Docket 98-137, Report and Order in CC

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Forbearance would diminish competition,⁸⁹ including in the Seattle MSA⁹⁰. Forbearance raises the very real possibility that Qwest could emerge as the only provider for a large portion of the telecommunications services available to Minnesotans.⁹¹

Accordingly, there is no basis for the Commission to conclude that forbearance would serve the public interest.

V. QWEST HAS NOT OFFERED REASONABLE COMMERCIAL AGREEMENTS

The WUTC reports that it reviewed "commercial agreements" entered into by Qwest with 12 small CLECs for access to network elements that replace UNE offerings in areas where they are unavailable under the *TRRO*.⁹² The WUTC found that these commercial agreements each contained a provision that excludes application of performance guarantees. The WUTC found that this provision "means that poor wholesale performance by Qwest for services provided under its commercial agreements is no longer subject to the QPAP, which is the only remaining incentive in place to ensure reasonable and adequate wholesale service quality."⁹³ The WUTC

Docket No. 98-137, Memorandum Opinion and Order in ASD 98-91, FCC 99-397 at ¶ 63 (rel. Dec. 30, 1999).

⁸⁹ Covad Comments at 60.

⁹⁰ WAG Comments at 3.

⁹¹ MPUC Staff Paper at 22.

⁹² WUTC Comments 14.

⁹³ *Id.* at 15.

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states that if forbearance is granted Qwest's commercial agreements will contain similar provisions which would "further erode the regulatory capacity to ensure adequate wholesale performance."⁹⁴

Qwest's commercial agreements are unreasonable because they exclude performance metrics and remedies. When the Commission granted Qwest's Section 271 authority in Nebraska and other states, it specifically held that the "performance assurance plans (PAP) that will be in place in the nine states provide assurance that the local market will remain open after Qwest receives Section 271 authorization."⁹⁵ Qwest's refusal to offer performance guarantees is probative evidence that Qwest has no intention to meet its Section 271 obligations going forward.

In addition to lack of performance guarantees, Qwest has not offered reasonable wholesale replacement products because it proposes to substantially increase prices that are causing CLECs to exit forborne markets. For example, Qwest has priced the commercial two-wire DS0 loop rates nearly 30% higher than TELRIC rates.⁹⁶

⁹⁴ *Id.*

⁹⁵ *Application by Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming*, WC Docket No. 02-314, Memorandum Opinion and Order, 17 FCC Rcd 26303, ¶ 440 (2002).

⁹⁶ *See* Declaration of Don Eben, Director Network Planning, McLeodUSA, WC Docket No. 04-223, at ¶¶ 20, 24-25 and Exhibit 3, at 43-70 of 70 (Qwest's DS0 Loop Facility offering is attached to the MSA as Service Exhibit 1) (July 23, 2007) ("Eben Declaration") *filed as an*

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Accordingly, there is no basis on the present record for the Commission to conclude that Qwest would offer reasonable terms and conditions of wholesale access in the absence of UNE obligations.

VI. THE COMMISSION SHOULD RESOLVE AND GRANT MCLEOD'S PETITION TO MODIFY THE OMAHA ORDER BEFORE CONSIDERING THE QWEST PETITIONS

Comments overwhelmingly support McLeodUSA's Petition for Modification filed in the *Omaha Forbearance Proceeding* requesting that the Commission reinstate Qwest's Section 251(c)(3) loop and transport unbundling obligations in the Omaha MSA.⁹⁷ There, McLeodUSA established that the Commission erred in its "predictive judgment" in Omaha and that since the Commission's grant of forbearance to Qwest in the Omaha MSA, Qwest has significantly increased prices in the affected wire centers to the point where McLeodUSA may have to abandon the market under the terms of Qwest's unilateral and unreasonable post-forbearance offerings.⁹⁸ As COMPTTEL rightfully notes in this proceeding, the Commission need only look to Qwest's post-forbearance behavior in Omaha as "a far better and more reliable prognostication than the Commission's 'predictive judgment' of what competitors will have to look forward

attachment to McLeodUSA Petition for Modification. According to Qwest's website, only one CLEC (TCG Omaha) has executed what appears to be Qwest's template agreement. See <http://www.qwest.com/wholesale/clecs/commercialagreements.html>.

⁹⁷ See, e.g., Cox Comments at 25; COMPTTEL Opposition at 19; Covad Comments at 48; VON Coalition Comments at 5-6.

⁹⁸ McLeodUSA Petition for Modification at 14-15.

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to in Denver, Minneapolis, Phoenix and Seattle in the event the Commission grants Qwest's forbearance petitions."⁹⁹ Covad similarly cautions the Commission not to "presume that Qwest would behave any differently in the Denver, Minneapolis/St. Paul, Phoenix or Seattle MSAs than it has in Omaha should it be successful in gaining Section 251(c)(3) forbearance in those four markets."¹⁰⁰

In stark contrast to the Commission's "predictive judgment" that Qwest's post-*Omaha Order* offerings would be just and reasonable, and despite McLeodUSA's diligent efforts to negotiate acceptable terms, Qwest has proposed only uneconomical, onerous, and non-negotiable offerings to replace the Section 251(c)(3) network elements for the affected wire centers. The Commission should thoroughly review and resolve the McLeodUSA Petition for Modification before further grants of forbearance.¹⁰¹ More specifically, the Commission should grant McLeodUSA's Petition for Modification and then deny Qwest's request for forbearance.

⁹⁹ COMPTTEL Opposition at 19.

¹⁰⁰ Covad Comments at 48.

¹⁰¹ ACC Comments at 21.

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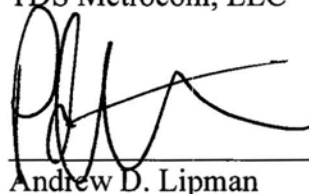
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VII. CONCLUSION

The Commission should deny the above-captioned Petitions.

Respectfully submitted,

Affinity Telecom, Inc.
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CP Telecom, Inc.
McLeodUSA Telecommunications
Services, Inc.
PAETEC Communications, Inc.
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